IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Misc. Application No. 169 of 2001
(Old No. 4117/1999)

Date of decision:- 24/05/2006

~~**A.F.R. (Approved for Reporting)**~~

Not approved for reporting

Initials of Judge

Date :- 24/5/2006

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 169 of 2001
(Old No. 4117/1999)

1. Keshav Ram S/o Bhaun Ram
2. Rami Ram S/o Bhaun Ram
3. Smt. Dani Ram W/o Dani Ram
4. Smt. Keshav Ram W/s Keshav
5. Smt. Rami Ram W/o Rami Ram
6. Nari Ram S/o Dani Ram
7. Hari Ram S/o Lal Ram
8. Heera Ram S/o Lal Ram
   All R/o Village – Mahat Gaon Patwari,
   Kshetra Maha Kaleshwar
   Tehsil – Ranikhet
   District - Almora .....petitioners

Versus

1. The Sessions Judge, Almora
2. Sub Divisional Magistrate, Ranikhet, Almora
3. Kanoongo Chaukhutia, Almora
4. Girdhar Singh S/o Sri Prem Singh
   R/o Gram Bhasbhira, Patwari Kshetra,
   Tehsil – Rani Khet
   District – Almora .....Respondents

Shri Nand Prasad, learned standing counsel for the petitioners.
Shri H.S. Rawal, learned counsel for the respondent No. 4

Hon'ble J.C.S. Rawat, J.

This petition has been filed to quash the judgment and order dated 23.02.1999 passed by the learned Sessions Judge, Almora.

Brief facts for the disposal of this petition are that the respondent No. 4-Girdhar Singh (hereinafter referred as the first party) moved an application u/s 145 Cr.P.C. on 20.10.1993 alleging therein the land in dispute was purchased by him by the ancestor of the applicants (hereinafter referred as the second party) and that there is an apprehension of breach of peach regarding possession of plot No. 1837, area 2 Nali, 15 Muthi and plot No. 1838, area 13 Muthi, total 3 Nali, 12 Muthi. On the application moved u/s 145 Cr.P.C., the Kanoongo Chaukhutiya was directed to report the matter

and Kanoongo Chaukhutiya submitted his report on 21.10.1993. Girdhar Singh-the first party had said that they had purchased this plot in the year 1971 and the mutation has also been done. Formerly, the disputed land was in possession of the father and the grand father of the second party. The land had been purchased through registered sale deed and the second party was in continuous possession over the disputed land. The second party threatened to the first party on 20.10.1983 as such there is an apprehension of breach of peace. The report was also given to the above effect by the Kanungo. The preliminary order was passed by the S.D.M. u/s 145 Cr.P.C. The first party filed the written statement and said that both the plot were purchased from Sri Niwas and Bhaun Ram in the year 1971 and since then he was in possession. The second party also filed the written statement. The second party No.3 has said that he had got no concern with the plot whereas the second party Nos. 1,2,3,5,6 and 8 had stated in the written statement that the report of the kanoongo is wrong because the land is the land of joint tenancy and before the settlement, it was Sirtan land of Bhaun Ram and he was in possession till his life. The second party Nos. 4 and 7 also denied the possession of the first party.

After appreciation of the evidence of the parties, the learned S.D.M. held that the petitioners-second party were in possession over the disputed land since long and such, the proceedings were terminated in their favour and they were directed to remain in possession till the title is decided by the competent court. Feeling aggrieved by the said order, the respondent No.4-first party to the proceedings preferred the revision before the revisional court. The revisional court while delivering its final order allowed the revision and set aside the order of the learned S.D.M. and observed that the order of the learned S.D.M. did not show that he had found the possession of the second party on the date of the preliminary order or two months before it. It was further observed that the learned

S.D.M. had not recorded his satisfaction regarding the apprehension of breach of peace and held that the preliminary order dated 14.02.1994 was illegal and the proceedings on the basis of that preliminary order could not be sustained. Feeling aggrieved by the said order, the present petition has been filed by the petitioners-second party.

Heard learned counsel for the parties and perused the record.

Learned counsel for the petitioners-second party contended that the preliminary order itself contains that there was likelihood of breach of peace and it was contended that the order of the learned Sessions Judge was against the record. He also contended that the learned Sessions Judge had erred in holding that the learned Magistrate had not recorded his satisfaction in the preliminary order u/s 145 Cr.P.C. regarding the apprehension of breach of peace. Perusal of the preliminary order reveals that the learned Magistrate had recorded the satisfaction with regard to the apprehension of peace. As such, I am of the view that the learned Sessions Judge had over looked that aspect in the notice as such the findings was against the record. It is also well settled that existing of the breach of peace is not necessary at the time when the final order was passed nor was there any provision u/s 145 Cr.P.C. requiring such a finding in the final order. If the learned Magistrate sets out that a beach of the peace exists, it is sufficient to presume that the breach of the peace would continue at every stage of the proceedings unless there was clear evidence on record to show that the dispute has ceased to exist so as to bring the case within the ambit of Sub section 5 of Section 145 Cr.P.C. Unless such contingency arises, the proceedings have to be proceeded to their logical end culminating in the final order under Sub Section (6) of Section 145 Cr.P.C. The finding of the learned Sessions Judge on this point was against the record.

Now it is to be examined that which of the party was in possession of the land in dispute on the date of the preliminary order or prior two months to the date of the preliminary order. The learned Sessions Judge had held that there is no categorical finding given by the learned S.D.M. to that effect and he found the infirmity in the judgment of the learned S.D.M. However, the learned Magistrate had held that the applicants were in possession over the land from the beginning, i.e., 1971 till the termination of the proceedings. It is also pertinent to mention here that the proceedings u/s 145 Cr.P.C. are of its summary nature and for the initiation of the proceedings, the existence of a dispute of immovable property likely to cause a breach of peace is the essential condition. The mere fact that the dispute over the possession of the property exists between the parties which obviously is a dispute of civil nature, would not be sufficient to assume the jurisdiction under section 145 Cr.P.C. if such dispute is not likely to cause the breach of the peace which is *sine qua non* for the initiation of the proceedings. It is also pertinent to mention here that this section does not confer the right upon the Magistrate to determine the title and the right of the parties. The Magistrate is only empowered to see as to whether the disputing parties were in possession on the date of the preliminary order or two months prior to that date. Thus the court while dealing with the proceedings u/s 145 Cr.P.C. is mainly concern with the possession of the property in dispute on the date of the preliminary order and dispossession.

In view of the above backdrop, I would like to examine the evidence adduced by the parties. The first party, i.e., respondent No.4-Girdhar Singh had adduced the oral evidence of himself as PW1 and Trilok Singh-PW3. PW3-Trilok Singh had supported the version of the PW1-Girdhar Singh and stated that he was in possession from the date of sale deed. He had also filed the copy of the sale deed which was executed by Sri Niwas Harbola and Bhaun

Ram, the father of the petitioners-second party in favour of the first party-respondent No. 4 in the year 1971. He had also filed the extract of the part-1 khautoni in which the name of the respondent No. 4 had been mutated in the khata. He had also filed the receipt of Irrigation Deptt. by which he paid fee for irrigating the said field. The applicants-second party had adduced the evidence of Rami Ram and Sri Nari Ram in support of his contention. They have stated that they were in continuous possession in the disputed field and they have inherited this property from Bhaun Ram who died in the year 1993. He had also filed the extract of khaatoni of 1374 *fasli* (1966 A.D.) and extract of khautoni 1394 (1986 A.D.). The second khautoni of the year 1394 falsi shows that the mutation in the name of the present second party had been recorded. The Kumaun Zamindari Abolition Act was made enforced in the year 1966 and according to the old tenancy law, there were three types of landholders, viz. hissedar, sirtan and khaikari. Hissedars were divided into two parts. Hissedar who was in possession of the land and the hissedar who were not in possession of the land at the time of vesting under the Kumaun and Uttarakhand Zamindari Abolition Act. The rights of bhumidhar were not conferred upon them who were not in possession over there hissedars land at the time of the vesting of Kumaun and Uttarakhand Zamindari Abolition Act. The person who were occupying the hissedars land of the tenure holder other than the hissedars those occupants were conferred the right of Asami over that land and later on they became Sirdan and ultimately they were made bhumidhar in the year 1977.

In view of the above backdrop, Bhaun Ram was the tenant in the hissedari land of Sriniwas Harbola as such, according to the provision of Kumaun and Uttarakhand Zamindari Abolition Act the applicants became asami at the time of enforcement of the aforesaid Act. Sri Niwas Harbola and Bhuwan Ram executed as sale deed of the disputed land in favour of the first party. Bhuwan Ram was the

ancestor of the petitioners-second party. The party is claiming this disputed land only on the ground that Bhuwan Ram was the land tenure holder of the property and he was in possession till his death in the year 1993 and thereafter the second party had been in possession. The recital in the sale deed is very clear which reveals that when the sale deed was executed by Sri Niwas Harbola & Bhuwan Ram, the ancestors of the petitioners-second party, he had stated that the possession had already been handed over to the hissedar Sri Niwas Harbola. This recital of handing over the possession clearly falsify the entire case of the second party-applicants. It is well settled principle of law that if a person was found to be in possession unless and until any evidence is led that he has been dis-possessed from the said property the continuity of possession would be presumed in favour of the person who was in possession. In this case, dispossession of Bhuwan Ram has been established by the recital of the sale deed as such, the petitioners-second party had to prove how they came into possession. It is also pertinent to mention here the mutation in the name of the first party had been carried out in the part first khautoni. It is also pertinent to mention here that when the mutation proceedings would have started, the notice would have been issued to the parties and proclamation would have been issued. The second party or their ancestor Bhuwan Ram would have an opportunity to challenge that he was not the party to the sale deed and he could have said that he never handed over possession to Harbola or any person. The said sale deed was not challenged before the competent court within 3 yeas from its execution. The order passed in the mutation proceedings may be termed as judgment in-rem. If there is any objection with regard to the sale deed, the objection should have been raised by the applicants-second party at the time of the mutation. No such document has been shown to me by which it can be said that the second party filed the objection before the revenue

court where the mutation proceedings were going on. It is also pertinent to mention here that the sale deed has not been cancelled as such, the document is subsisting till today. Learned counsel for the applicant relied upon the khautoni of the year 1994 which shows that the mutation had been carried out in their favour. The second party was not in possession on the date when these proceedings started. Theland land already been sold to the first party as such the said entry did not give any benefit to the second party and the possession had already been handed over to the first party by virtue of the sale deed executed in the year 1971.

In view of the above findings, I am of the view that the first party-Girdhar Singh was in continuous possession of the land in dispute till the date of preliminary order u.s 145 Cr.P.C. including two months prior to the preliminary order. As, such, the order passed by the learned Sessions Judge dated 23.02.1999 is liable to be set aside and the same is set aside. The petition is liable to be allowed and is allowed accordingly.

All applications pending in this case are stand disposed of in terms of the judgment.

(J. C. S. Rawat, J.)

24th May, 2006
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